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# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 266

In the Matter

of

GEORGE A. CARDEN,

*Bankrupt.*

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McCLAVE & COMPANY,

*Petitioners,*

GEORGE A. CARDEN, DANIEL LOEB and Petitioning Creditors,

*Appellees.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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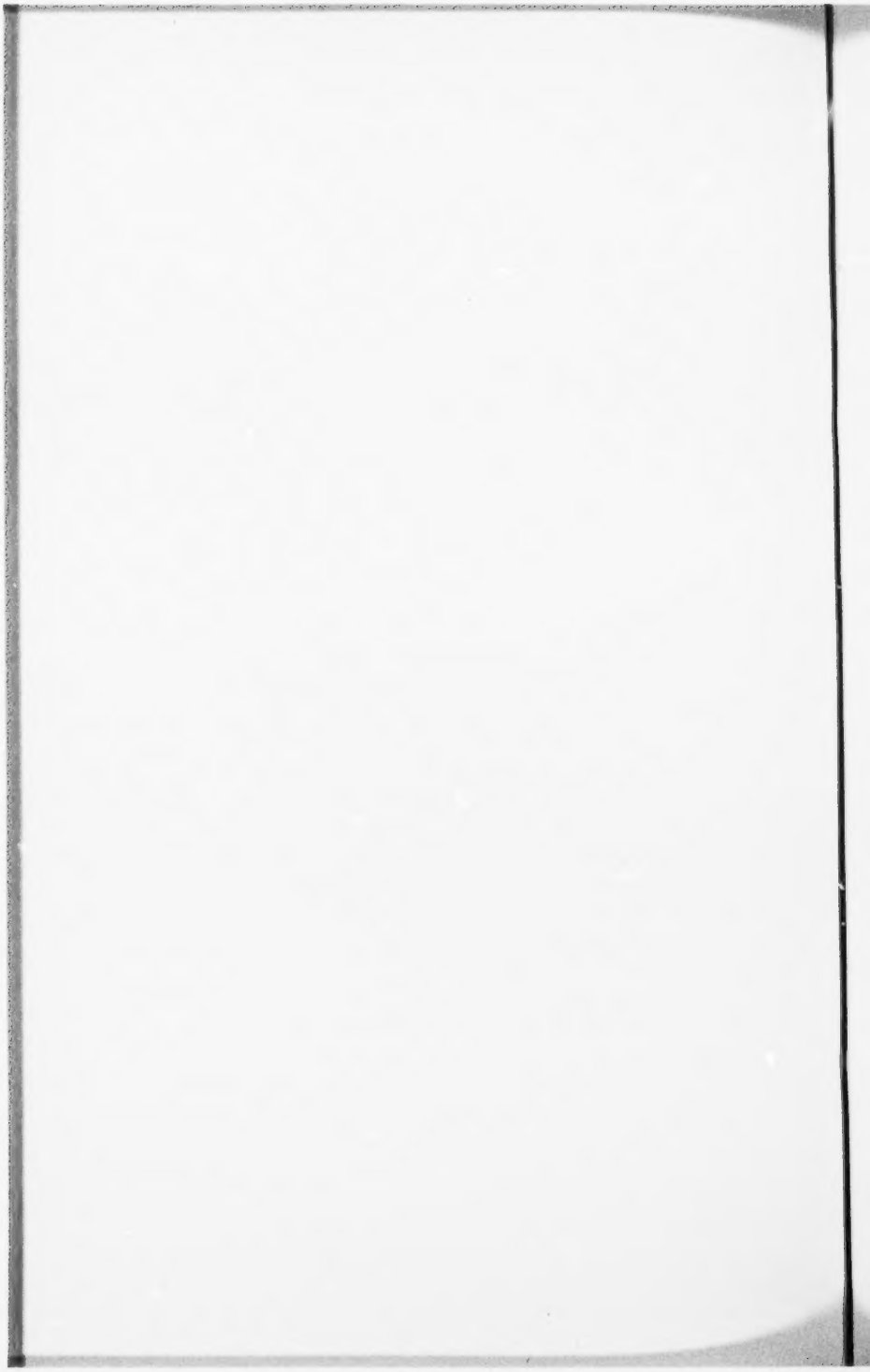
SAMUEL C. DUBERSTEIN,
*Attorney for Petitioners.*



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# Supreme Court of the United States

OCTOBER TERM, 1941.

No.

In the Matter
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GEORGE A. CARDEN,
Bankrupt.

MCCLAVE & COMPANY,
Petitioners,
GEORGE A. CARDEN, DANIEL LOEB and
Petitioning Creditors,
Appellees.

## PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Clifford H. McCall and Arthur Sewell, 2nd, copartners doing business as McClave & Co., respectfully shows to this Honorable Court and alleges:

### A.

### Summary Statement of the Matter Involved.

They are the petitioners herein.

This is a petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for

the Second Circuit, entered the 14th day of April, 1941 (page 49), which affirmed the order of the Honorable District Judge, Alfred C. Coxe of the United States District Court for the Southern District of New York, entered March 11, 1940 (pages 4-5).

The Circuit Court of Appeals affirmed the order of the District Court which had denied petitioners' motion for an order dismissing a purported involuntary petition in bankruptcy and vacating all subsequent proceedings thereunder (pages 45-49). Petitioners' motion had been made in their capacity as creditors of the bankrupt. The motion was denied, and the order of denial subsequently affirmed, upon the ground that Sections 18 (b) and 59 (f) of the National Bankruptcy Act (known as the Chandler Act) which became effective in 1938 had, in the opinions of the lower courts, deprived creditors of their previous right to move to vacate the bankruptcy petition and the subsequent proceedings.

Petitioners will first set forth the facts, and thereafter the sections of the statutes involved.

### (1) Facts.

On February 18, 1933, a purported involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against the alleged bankrupt herein (pages 39-42). It consisted of a printed form and included the standard phrase as to the occurrence of an act of bankruptcy "within four months preceding the filing of this petition" (page 40). It had, however, been signed by the three petitioning creditors approximately one year prior to the date of its filing (pages 41-42). On its very face, therefore, it did not—and, in fact, could not—have referred to an act of bankruptcy occurring within four months preceding the date of its filing.

The subpoena which had been issued on the date of the filing of the alleged petition was never served upon the bankrupt (page 35). For six and one-half years at least, neither bankrupt nor creditor nor anyone else performed a single act in recognition of the existence of a petition in bankruptcy. Upon the contrary. The $20. balance remaining over from the sum deposited in Court upon the filing of the purported petition was returned to the attorney for the petitioning creditors (page 35). And within ten days after the alleged petition had been filed, the Empire Trust Company, a creditor in the sum of $98,000., caused a receiver to be appointed in supplementary proceedings under its judgment against the bankrupt in the courts of New York State (pages 28, 30). This receivership was thereafter duly extended to ten other judgments which had been obtained against the bankrupt and whose aggregate total exceeded $1,600,000 (page 30).

One of the judgments to which this state court receivership was extended was that owned by these petitioners. The judgment was in the amount of $662,354.68. The state court receivership was extended to it on July 26, 1937 (page 30). The position of petitioners' judgment, as determined by the date of the extension to it of the state court receivership, was extremely advantageous. Its lien was junior to the lien of judgments totalling approximately $113,000, but senior to that of eight other judgments aggregating more than $1,500,000 (page 30).

Sometime after the state court receivership had been extended to these judgments, certain of the creditors met together for the sole and conceded purpose of hitting upon a plan to deprive creditors of the priorities which they had obtained in the proceedings in the state court (page 19). At that meeting, it was then for the first time "discovered" that an alleged bankruptcy petition had been filed some six years before (page 19). Accordingly, it was now determined to press that old petition to an ad-

judication in order to upset the priorities acquired in the intervening state court receivership (page 19). Creditors and bankrupt cooperated (page 19). On October 4, 1939, the attorney for the petitioning creditors attempted to revive the old petition by moving for an order permitting them to repay to the Clerk of the Court the sum of $20 which had been returned to their attorney upon their abandonment of the petition, and for the issuance of an alias subpoena to the alleged bankrupt in place of the original subpoena which had not been served (pages 33-4). The moving papers were served solely upon the bankrupt (page 34), who defaulted (page 31). Upon the bankrupt's default in answering the alias subpoena, an alleged adjudication in bankruptcy was filed in the District Court on December 21, 1939 (pages 32-3). The alleged order of adjudication contained the recital that it was pursuant to the petition filed on February 18, 1933 (page 32).

Promptly upon learning of the foregoing attempt to deprive their judgment of its lien, petitioners moved to vacate the adjudication in bankruptcy and all proceeding thereunder (pages 6-14).

The sections of the statute which are involved, and the determining considerations, will be considered in the subdivisions which follow.

### (2) Statutes Involved.

The denial to these petitioners of the right to vacate these alleged bankruptcy proceedings has been predicated, in both the lower courts, upon provisions of the present Bankruptcy Act which differ from the provisions in effect under the former Bankruptcy Act. Accordingly, petitioners will set forth the relevant provisions in both Acts in parallel columns:

| Old Bankruptcy Act | Chandler Act Effective June 22, 1938. |
|---|---|
| Section 18 (b). The bankrupt, or any creditor, may appear and plead to the petition within five days after the return date, or within such further time as the court may allow. | Section 18 (b). The bankrupt and in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return date or within such further time as the court may allow. |
| Section 59 (f). Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition. | Section 59 (f). Creditors other than the original petitioners may at any time enter their appearance and join in the petition. |

**B.**

**Jurisdiction of this Court.**

(1) *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court is based upon Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925 (43 Stats. 938), also found in 28 U. S. C. A., Section 347 (a) and Section 24 (c) of the Bankruptcy Act.

(2) *Timeliness of Application for Writ of Certiorari.*

The date of the entry of the order, judgment and decree of the Circuit Court of Appeals sought to be reviewed is April 14, 1941. The date of the filing of a certified copy of the record and of the Petition for a Writ of Certiorari and the Brief in support thereof is July 12, 1941.

(3) *Opinions of the Courts below.*

The Circuit Court's opinion was rendered on March 18, 1941 and appears at pages 45-48 of the record. It is officially reported in 118 Fed. (2nd) 677. The District Court's opinion was rendered on February 29, 1940, and appears at page 5 of the printed record. It was not officially reported.

## C.

### The Questions Presented.

The record presents the following questions:

1. Is a purported involuntary bankruptcy petition, which fails to allege the commission of an act of bankruptcy within four months preceding the filing, jurisdictionally defective? If so, does the Chandler Act prevent a creditor from attacking bankruptcy proceedings thereunder?

2. Does the Chandler Act permit a creditor to vacate bankruptcy proceedings in the absence of a jurisdictional defect upon the ground, simply, "that the proceeding ought not to be allowed to proceed"? If so, should petitioners' motion have been granted in this case?

3. May the Chandler Act constitutionally be employed to deprive creditors of a remedy which had been available to them under the old Bankruptcy Act effective on the date of the filing of the petition, in a situation in which the withdrawal of the remedy must produce the loss of a vested substantive right? If not, should the Chandler Act have been deemed applicable to petitioners' motion in this case?

## D.

### Reasons Relied on for the Allowance of the Writ.

The questions of law involved are concerned with a Federal statute, to wit: the Chandler Act. Questions (1) and (2) pertain to the manner in which that statute should be interpreted, if applied. Question (3) is concerned with the question of its applicability to a proceeding initiated by an involuntary petition filed under the old Bankruptcy Act; this involves, in part, a question of constitutionality. These questions have not been passed upon by this Court. In fact, they have not been passed upon by any of the Circuit Courts other than as implicit in the decision in the case at bar.

The answers to these questions which are implicit in the decision of this Circuit Court of Appeals are directly contrary to the doctrines which had been announced in similar situations arising under the old Bankruptcy Act. Under the old Act, anyone might attack a petition or adjudication for jurisdictional defect, even though not expressly authorized by statute. *In re Ettinger* (C. C. A. 2nd Cir.), 76 Fed. (2nd) 741; *Chicago Bank of Commerce* v. *Carter* (C. C. A., 8th Cir.), 61 Fed. (2nd) 986; *In re American Bond & Mortgage Co.*, (C. C. A., 7th Cir.), 61 Fed. (2nd) 875, aff'd 289 U. S. 165; *In re Vassar Foundry*

*Co.*, (D. C., E. D. Michigan), 293 Fed. 248, aff'd (C. C. A. 6th Cir.) 2 Fed. (2nd) 240; *In re Day*, (D. C., D. Maryland), 22 Fed. Supp. 946; *In re New York Tunnel Co.*, (C. C. A., 2nd Cir.), 166 Fed. 284. Even the voluntary petition, normally invulnerable to attack by creditors, lost that invulnerability when jurisdictionally defective. *In re Ettinger* (C. C. A., 2nd Cir.), 76 Fed. (2nd) 741; *Chicago Bank of Commerce* v. *Carter* (C. C. A., 8th Cir.) 61 Fed. (2nd) 986; *In re American Bond & Mortgage Co.*, (C. C. A., 7th Cir.), 61 Fed. (2nd) 875, aff'd 289 U. S. 165; *In re Vassar Foundry Co.*, (D. C., E. D. Michigan), 293 Fed. 248, aff'd (C. C. A., 6th Cir.), 2 Fed. (2nd) 240. Moreover, this Court stated that even persons not authorized by statute to attack the proceedings could do so "on grounds, whether jurisdictional or not, that the proceedings ought not to be allowed to proceed". *Securities & Exch. Com'n.* v. *U. S. R. & Imp. Co.*, 310 U. S. 434, 457-8. Finally, it has been held that the rights of creditors were determined as of the date of the filing of the petition itself (*U. S.* v. *Marxen*, 307 U. S. 200, 207) and could not be divested by the retroactive application of a subsequently enacted statute. *In re John G. Gasteiger & Co. Inc.*, (C. C. A., 2nd Cir.), 25 Fed. (2nd) 642, 643; *Jacobus* v. *Colgate*, 217 N. Y. 235, 241 (per Cardozo, J.).

These questions are important. This Court should determine whether the new Act is to become the basis of doctrines directly contrary to vital principles which had been universally acknowledged and followed before its passage.

The considerations herein set forth will be amplified in the brief submitted herewith.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding

that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings of the case, and that the said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other, further and different relief in the premises as to this Honorable Court may seem just and proper, and your petitioners will ever pray.

Dated, New York, July 10th, 1941.

McClave & Co.,
*Petitioners.*

By: Clifford H. McCall,
*Partner.*

State of New York }
County of New York } ss.:

Clifford H. McCall, being duly sworn, deposes and says that he is one of the partners of McClave & Co., a copartnership consisting of Arthur Sewell, 2nd, and self and is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof to be true.

Clifford H. McCall.

Sworn to before me this
10th day of July, 1941.

Edward M. Stoll,
Notary Public West. Co.,
Ctf. filed N. Y. Co., Co. Clk. No. 1605,
Comm. Expires March 30, 1943.

(Seal)

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Petitioners,
GEORGE A. CARDEN, DANIEL LOEB and
Petitioning Creditors,
Appellees.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Statement of the Case.

The essential facts have been set forth in the foregoing petition. They may briefly be epitomized.

The bankrupt has joined together with a number of creditors to effectuate a plan which, if successful, will deprive the $660,000 judgment owned by petitioners of its seniority under the state court receivership. Their *modus operandi* was to employ a patently invalid and abandoned petition, filed six years before, as the springboard of an adjudication in bankruptcy. If sustained, the adjudication will then have been made upon an alleged petition which antedated the state court receivership.

Petitioners have moved to preserve the lien of their judgment by attacking the validity of the ancient alleged petition and, derivatively, the proceedings thereunder. The lower courts have held that petitioners are not the proper parties on whose behalf such a motion can be made; that, although the sole purpose of this entire bankruptcy proceeding is, concededly, that of destroying the priority of their lien, they are to be excluded from participation and forced to remain passive observers of the destruction of their rights.

## II.

### Specification of Errors.

The Circuit Court of Appeals affirmed the denial of petitioners' motion to vacate the bankruptcy proceedings upon the ground that the Chandler Act precluded such a motion if made by a creditor. That decision was erroneous for three reasons:

1. It ignored the fact, and the legal implication from the fact, that the alleged bankruptcy petition was jurisdictionally defective on its face.
2. It ignored the practice of bankruptcy courts to permit motions to vacate proceedings to be made by those not expressly authorized by the statute in any situation in which it would appear that the proceeding ought not to be allowed to proceed.
3. It ignored the manifest injustice of construing the Chandler Act in such a way as to deprive petitioners of a valuable right which had vested under the old Bankruptcy Act effective on the date of the filing of the alleged petition.

Petitioners urged each of these three contentions in both of the lower courts.

## POINT I.

**Petitioners' motion to dismiss should have been granted by reason of the fact that the alleged petition in bankruptcy was jurisdictionally defective on its face.**

The alleged petition in involuntary bankruptcy was not filed until approximately one year after the dates upon which it had been signed by the several petitioning creditors. Accordingly, it was jurisdictionally defective for failure to allege the occurrence of an act of bankruptcy within four months next preceding the date of filing. Bankruptcy Act, Section 3 (b); *In re D. F. Herlehy Co.* (D. C., N. D. New York), 247 Fed. 369; *In re McGraw* (D. C., N. D. West Virginia), 254 Fed. 442, *In re Day* (D. C., D. Maryland), 22 Fed. Supp. 946.

A bankruptcy petition which is jurisdictionally defective on its face can be attacked by anyone. It should be vacated by the court *sua sponte*. *In re Ettinger* (C. C. A., 2nd Cir.), 76 Fed. (2nd) 741; *Chicago Bank of Commerce* v. *Carter* (C. C. A., 8th Cir.), 61 Fed. (2nd) 986; *In re American Bond & Mortgage Co.* (C. C. A., 7th Cir.), 61 Fed. (2nd) 875, aff'd 289 U. S. 165; *In re Vassar Foundry Co.* (D. C., E. D. Michigan), 293 Fed. 248, aff'd (C. C. A., 6th Cir.) 2 Fed. (2nd) 240; *In re Day* (D. C., D. Maryland), 22 Fed. Supp. 946; *In re New York Tunnel Co.* (C. C. A., 2nd Cir.) 166 Fed. 284.

A single illustration of the application of this rule under the old Bankruptcy Act forms a perfect parallel to the instant situation. Thus, it had always been the rule under the old Act that a creditor would not be permitted to attack a voluntary, as distinct from an involuntary petition. Yet the creditor was permitted to attack a voluntary petition which was jurisdictionally defective on its face in situations wherein, if the defect had been less than

jurisdictional, he would have been barred. *In re Ettinger* (C. C. A., 2nd Cir.), 76 Fed. (2nd) 741; *Chicago Bank of Commerce* v. *Carter* (C. C. A., 8th Cir.), 61 Fed. (2nd) 986; *In re American Bond & Mortgage Co.*, (C. C. A., 7th Cir.), 61 Fed. (2nd) 875, aff'd 289 U. S. 165; *In re Vassar Foundry Co.* (D. C., E. D. Michigan), 293 Fed. 248, aff'd (C. C. A., 6th Cir.), 2 Fed. (2nd) 240.

Finally, a bankruptcy petition which is jurisdictionally defective on its face cannot be redeemed by subsequent amendment or converted into a voluntary petition *nunc pro tunc*. If its defect be of a jurisdictional order, an amendment could render it valid only as of the date of the amendment itself, leaving unaffected whatever liens or other rights may have vested in the interim. *In re Condon* (C. C. A., 2nd Cir.), 209 Fed. 800; *In re Louisell Lumber Co.* (C. C. A., 5th Cir.), 209 Fed. 784; *Hovland* v. *Farmers' State Bank* (C. C. A., 8th Cir.), 10 Fed. (2nd) 478; *In re Hollywood Land & Water* Co. (D. C., S. D. Florida), 41 Fed. (2nd) 778; *In re Triangle S. S. Co., Inc.* (D. C., S. D. New York, per Mayer, D. J.), 267 Fed. 303.

The Circuit Court treated this situation cavalierly. It stated, simply, "that it is, of course, undoubted that the court had jurisdiction of the petition when filed" (page 48). The decisions above cited are to the contrary. If it were the law that the jurisdictional requirements of the Bankruptcy Act could be met, *ipso facto*, through the device of a paper's simply denominating itself a petition in bankruptcy (despite its failure to allege the facts required by the Bankruptcy Act), then the piece of paper in this case (which did not allege the commission of an act of bankruptcy within four months next preceding the date of filing) satisfied the jurisdictional requirement. But otherwise it did not.

## POINT II.

**Petitioners' motion to dismiss the bankruptcy proceedings should have been granted upon the ground that the bankruptcy proceedings ought not to be allowed to proceed.**

There are two questions to be considered: one of power and one of the propriety of its exercise.

In *Securities & Exch. Com'n.* v. *U. S. R. & Imp. Co.*, 310 U. S. 434 (decided under the Chandler Act), this Court announced the rule in the following language (pages 457-8):

> "And it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition to move for the vacation of an adjudication or the dismissal of a petition, on grounds, whether jurisdictional or not, that the proceeding ought not to be allowed to proceed."

Since the Congress which enacted the Chandler Act was presumably aware of the existence of the rule referred to by this Court, it is reasonable to assume that its failure to specifically confer such rights upon creditors was due to its reliance upon the reserve power of the bankruptcy court to accord such a status to them whenever the situation required it.

We can conceive of no situation more clearly requiring the exercise of that power than the one here presented. Creditors, who had attested their own recognition of the insufficient character of the pretended 1933 petition by causing a state receivership to be extended to their own judgments, have sought to "revive" the pretended petition some six years later for the concededly sole purpose of destroying the lien of petitioners' judgment. The circumstance that the alleged bankrupt was a party to that

plan sufficiently accounts for his own failure to challenge the validity of the proceedings. In this situation, a rule which would limit the right of challenge to the bankrupt, while withholding it from these lien creditors, would have this anomolous character: that it would endorse a collusive proceeding by confining the participants to those interested in obtaining the same result, while excluding the only ones having a contrary stake! By such exclusion (as the opinion of the Circuit Court itself avows) petitioners' judgment lien may be destroyed in consequence of proceedings in which they were not even permitted to participate (page 48).

Accordingly, the exclusion of petitioners from the bankruptcy proceedings in which the fate of their judgment lien is to be determined must be the full equivalent of the production of the famous Shakespearean tragedy without Hamlet.

## POINT III.

**If petitioners' motion to dismiss the bankruptcy proceedings were precluded by the Chandler Act, then it should have been determined and granted under the old Bankruptcy Act.**

This alleged petition in bankruptcy was filed in 1933 under the Old Bankruptcy Act. This Court has held that the rights of creditors, both as against the estate and as among themselves, are fixed as of the date of the filing of the petition. *U. S.* v. *Marxen*, 307 U. S. 200, 207. Since it is conceded that petitioners' motion to vacate these bankruptcy proceedings would have been granted under the old Bankruptcy Act, the question now arises whether that right is destructible by reason of a statute which only became effective some five years after the alleged petition had been filed, and approximately a year after the lien under the petitioners' judgment had vested.

The situation cannot be disposed of via the simple device of characterizing petitioners' rights under the old Act as procedural and then asserting that matters of remedy do not partake of the immunity of a vested right. As we have seen, the Circuit Court itself expressed its recognition of the importance of petitioners' right to challenge the validity of the bankruptcy proceedings (page 46). Upon that right the validity of their judgment lein in excess of $660,000 directly depends. In such a situation, the withdrawal of the essential remedy must necessarily work a retroactive destruction of the substantive right which is dependant thereon.

This doctrine was expressed by Judge Cardozo in *Jacobus* v. *Colgate*, 217 N. Y. 235, as follows (p. 241): "that statutes which take away every remedy for past wrongs as distinguished from statutes which merely change the remedy are condemned as unconstitutional."

The impropriety of permitting this later statute to deprive petitioners of the important remedy (and derivative substantive right) which they had enjoyed under the old Act may be expressed in either of two ways. It might be said, in the language of this same Circuit Court in another case, that retroactive application of a statute will be denied whenever such application would "disturb vested rights". *In re John G. Gasteiger & Co. Inc.*, (C. C. A., 2nd Cir.), 25 Fed. (2nd) 642, 643. Or it might alternatively be said that a retroactive application of the statute would be unconstitutional pursuant to the reasoning of Cardozo, J.

Whichever rubric be employed, the conclusion must be the same. "No writ, no right". A remedy so indispensable to the preservation and defense of a vested right must be immune to destruction by a statute becoming effective more than five years after the date of the filing of the alleged petition.

**Conclusion.**

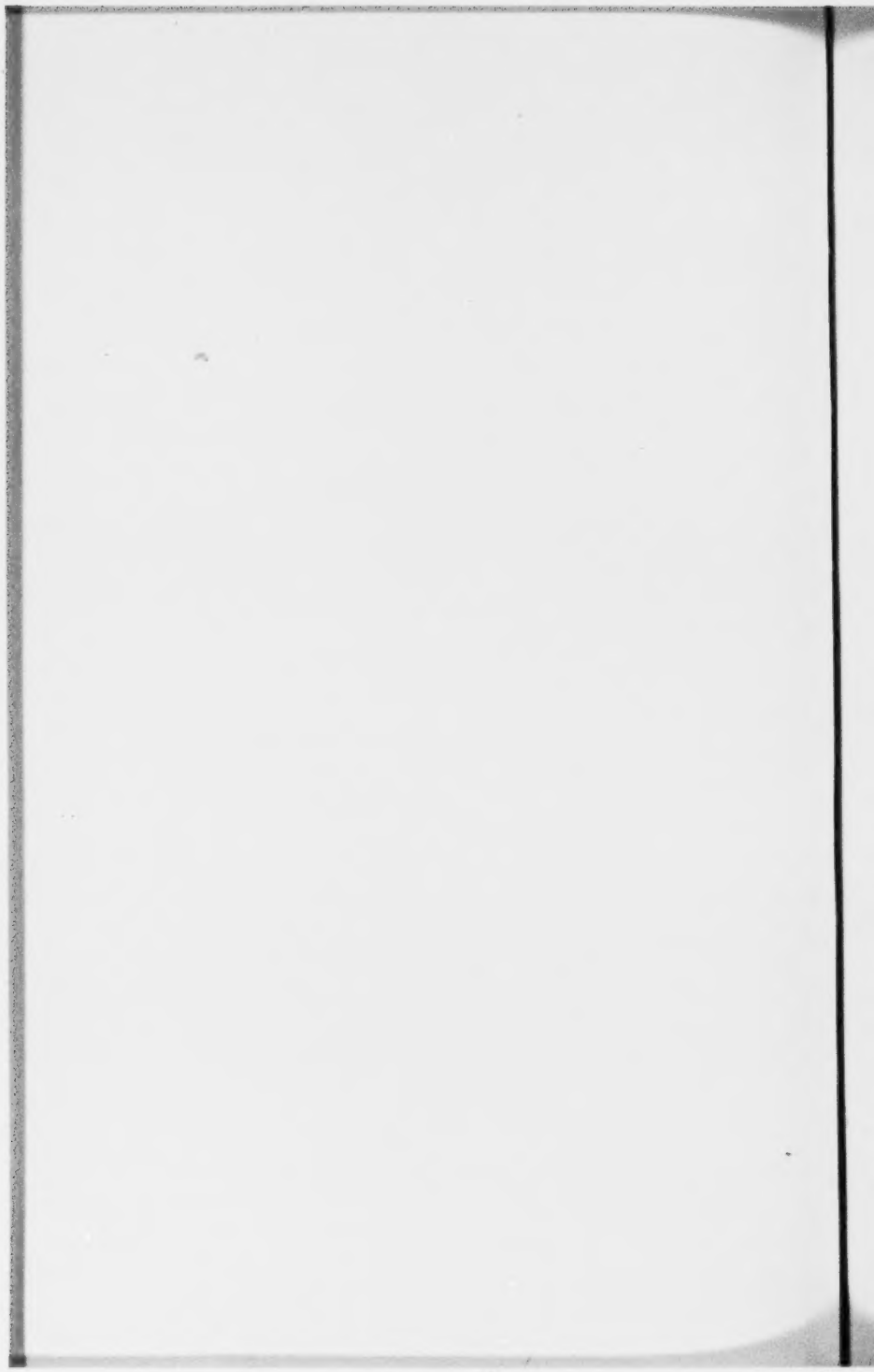
As we have seen, the situation presents important questions with respect to the interpretation of a federal statute. Neither of these questions has been passed upon by this Court directly. Analogical decisions handed down before the enactment of the Chandler Act indicate the decision of the Circuit Court to have been erroneous.

These questions must inevitably be passed upon and determined by this Court at some time. The substantial character of petitioners' interest as the owner of a judgment in excess of $660,000 makes it seem desirable that the matters be determined now since they are directly raised on this record.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL C. DUBERSTEIN,
*Attorney for Petitioners.*



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GEORGE A. CARDEN,

Bankrupt.

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Petitioners,

GEORGE A. CARDEN, DANIEL LOEB, and Petitioning Creditors,

Respondents.

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS BOEHM,
Counsel for Respondents.

LOUIS BOEHM,
JOSEPH LEVINE,
ROBERT L. BOEHM,
of Counsel.

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# Supreme Court of the United States

OCTOBER TERM, 1941

| | |
|---|---|
| IN THE MATTER of GEORGE A. CARDEN, Bankrupt. | No. 266 |
| MCCLAVE & COMPANY, Petitioners, | |
| GEORGE A. CARDEN, DANIEL LOEB, and Petitioning Creditors, Respondents. | |

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement

This brief is submitted in opposition to the petition for a writ of certiorari to review a decision of the Circuit Court of Appeals dated March 24, 1941, unanimously affirming an order of Hon. Alfred C. Coxe, District Judge, dated March 11, 1940 which denied petitioners' motion to dismiss an involuntary petition in bankruptcy (R. 4, 5).

### The Facts

The petitioners are creditors of the bankrupt. The involuntary petition was filed on February 18, 1933 (R. 4) and was prosecuted to adjudication on December 21, 1939 (R. 32, 33). The principal ground of petitioners' motion

was that the petition does not state facts sufficient to confer jurisdiction upon the Court (R. 9). Petitioners' avowed purpose in seeking the dismissal of the petition in bankruptcy is to secure a priority over other creditors (R. 16, 25, 30). Petitioners, McClave & Company, are the only creditors seeking a dismissal of the petition. The bankrupt consented to adjudication (R. 5).

On June 5, 1939, petitioners caused the entry of two judgments against the bankrupt, one for $33,482.84, the other for $5,012.40 (R. 22, 23). Concededly, petitioners' claim of preference is not based upon these judgments (R. 30). The preference claimed by petitioners is based upon a judgment for $662,354.68 purchased by them for $100 at a receiver's sale on February 21, 1939 (R. 23). This judgment was recovered by one Irma Brown, by default, on July 21, 1937, on a promissory note given for a moral, but not legal, consideration (R. 15, 18). It is doubtful whether a judgment not based on a valid, legal claim is provable in bankruptcy.

On February 18, 1933, when the involuntary petition was filed in the court below, no receiver had been appointed, in any court, of the bankrupt or his property. On February 28, 1933, a receiver of the bankrupt's property was first appointed (R. 30).

Thereafter, on July 26, 1937, such receivership was extended to the $662,354.68 judgment now owned by petitioners, but which they had purchased for only $100 on February 21, 1939, almost two years later (R. 23).

Proceedings subsequent to the filing of the petition in bankruptcy were as follows: Sometime in 1939, several creditors and the bankrupt and his attorney held an informal meeting. It was there stated that on February 18, 1933, prior to the time when any claim of preference through the appointment of a receiver could have been made, an involuntary petition against the bankrupt had been filed. It was then suggested that if the petition be followed through and continued to adjudication, all of the

creditors could participate equally in whatever assets might be recovered, and in that way preferences would be avoided. Said creditors, together with the bankrupt, agreed to cooperate to the end that no particular creditor should obtain an undue advantage, and thereby deprive the other creditors of an equal share in whatever assets could be recovered. It was in pursuance of this understanding that the petitioning creditors decided to proceed with the involuntary petition which had been filed in 1933 (R. 19).

Several creditors in the same general position as the petitioners, but with unquestionably valid claims, have joined the other creditors in opposing petitioners' motion (R. 16).

This controversy, therefore, is really between a single creditor of the bankrupt, holding a doubtful claim purchased for a nominal consideration, and the other creditors, as to whether this creditor should be entitled to a preference over the other creditors in the distribution of the bankrupt's assets to the extent of $662,000, on a claim for which it paid the sum of $100 (R. 19).

In denying the motion to dismiss, Judge Coxe wrote the following opinion (R. 5):

> "Under Section 18-(b) of the present Bankruptcy act, creditors have no standing to contest the allegations of an involuntary petition; this is a radical change from the provision of the old section 18 (B). The Court clearly had jurisdiction in the present case, and the bankrupt does not question the adjudication.
>
> "The motion to vacate is denied."

On appeal, the Circuit Court of Appeals unanimously affirmed the decision of the District Court, with an opinion which is reported in 118 Fed. 2nd 677.

Substantially the only asset possessed by the bankrupt is a claim against the Government of the United States arising out of the sale of certain ships by the bankrupt and his partner during the World War. Enabling legislation was obtained permitting prosecution of the claim in the Court

of Claims, where, after voluminous testimony, the examiner reported in favor of allowing the claim for $2,800,000, but the Court of Claims disapproved the report and rejected the claim. Legislation is still being sought to permit the further prosecution of the claim by appeal to the Supreme Court, but to date has not been obtained (R. 20).

### Summary of Argument

I. The District Court had jurisdiction of the petition in bankruptcy upon the filing thereof; the alleged defects contained therein were not jurisdictional.

II. The petition presents no question warranting an appeal to this Court.

III. In any event, under the Chandler Act petitioners have no standing to contest the allegations of the bankruptcy petition.

IV. Petitioners' right to attack the bankruptcy proceedings is governed solely by the Chandler Act. It is clearly practicable and equitable to apply the Chandler Act to this situation.

## ARGUMENT

### POINT I

**The District Court had jurisdiction of the petition in bankruptcy upon the filing thereof; the alleged defects contained therein were not jurisdictional.**

Petitioners' entire argument is based upon a single premise, wholly unsupported by authority, that the petition in bankruptcy was jurisdictionally defective because not filed until approximately one year after it had been signed by

the Petitioning Creditors. Petitioners cite three District Court cases in support of this facile assumption. None of these cases are in point upon this proposition.

On the other hand, the Circuit Court of Appeals, in its opinion herein, has carefully enunciated the applicable law. It stated at page 679 of its opinion (*In Re Carden,* 118 Fed. 2nd 677 [decided March 24, 1941]):

> "That brings us to the second question, always present, as to whether or not the order of adjudication was within the jurisdiction of the district court. As to that it is, of course, undoubted that the court had jurisdiction of the petition when filed and its jurisdiction of the bankrupt is clear. Whatever defects there may have been in the allegation of acts of bankruptcy at most made the petition demurrable because too general or because acts within four months of the filing were as of the date of signing wholly in the future and not accomplished facts. Such defects, however, could be cured by amendment and were not jurisdictional. The mere lapse of time between the filing of the petition and the service and adjudication could not deprive the court of jurisdiction.
>
> "At most, the order of adjudication might have been erroneous but that did not deprive the court of the jurisdictional power to make it. *In Re Shoesmith,* 135 Fed. 684. And, as we have seen, the appellant could not object to it for error merely. It must now be treated as a final order and all pertinent issues are res adjudicata. Compare, *Des Moines Nav. and R. R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552, 8 S. Ct. 217, 31 L. Ed. 202."

The petitioners complain that the Circuit Court of Appeals "treated this situation cavalierly". On the contrary, the Circuit Court's ruling is based upon law so well established that apparently the Court considered it unnecessary to cite authorities.

It is fundamental that upon the filing of a petition in bankruptcy containing the essential allegations, and the service of process, the Court obtains jurisdiction of the

subject matter and of the parties. *Denver First National Bank* v. *Klug,* 186 U. S. 202; *Lamp Chimney Co.* v. *Brass & Copper Co.,* 91 U. S. 656, 660; *In re First National Bank,* 152 Fed. 64; *In re Broadway Saving Trust Co.,* 152 Fed. 152; *In re 211 East Delaware Place Building Corp.,* 14 Fed. Supp. 96; *In re Tully,* 156 Fed. 634, 637; *In re Plymouth Cordage Co.,* 135 Fed. 1000, 1004; *United States ex rel. Weisman* v. *Brown,* 281 Fed. 657, 660; *In re Berner,* 3 A. B. R. 325 (U. S. D. C. N. D. Ohio).

In the case of *In Re First National Bank,* 152 Fed. 64 (C. C. A. 8th Cir.), the Court clearly expressed the foregoing principle as follows (pp. 68-9):

> "Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. * * * *A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief.* * * * *The facts which conditioned the jurisdiction of the court were the filing of the petition and the service of the subpoena. In re Plymouth Cordage Co.,* 135 Fed. (2) 1000, 1004; 68 C. C. A. 434, 438."

From this it clearly follows that the District Court had jurisdiction of the petition in bankruptcy herein in the first instance. Any defect in the pleading of said petition was not a jurisdictional defect. In and of itself it did not preclude an adjudication. *Bradley* v. *Huntington, et al.,* 277 Fed. 948 (C. C. A., 2nd Cir.); *In re Shoesmith,* 135 Fed. 684; *In Re Middle West Utilities Co.,* 70 Fed. (2) 825; *In Re S. W. Strauss & Co.,* 67 Fed. (2) 605; *In Re 211 East Delaware Place Bldg. Corp.,* 14 Fed. Supp. 96; *Conway* v. *German,* 166 Fed. 67; *In Re Plymouth Cordage Co.,* 135 Fed. 1000.

In the instant case, the allegations of the petition were admitted by the bankrupt when he defaulted. Under the

authority of the foregoing cases, the Court had jurisdiction and the subsequent adjudication was therefore proper.

It is well settled that verification of a petition is a matter of form not affecting the jurisdiction of the Court, and, if the bankrupt pleads to the merits without objecting to the form of the petition (or, as in this case, defaults), he waives any defects in the verification. *In re O'Brien,* 78 F. (2) 715 (C. C. A., 2nd Cir.); *Leidigh Carriage Co.* v. *Stengel,* 95 Fed. 637; *Rosaly* v. *Gonzalez,* 106 Fed. (2) 169, 171; *Sabin* v. *Blake M'Fall Co.,* 223 Fed. 501; *In Re Plymouth Cordage Co.,* 135 Fed. 1,000; *In Re Vastbinder,* 126 Fed. 417; *In Re McNaughton,* 16 Fed. Cas. 323.

In *In Re O'Brien,* 78 F. (2) 715, *supra,* the appellant contended that the debtor's petition had not been verified, and that therefore, the court had no jurisdiction. The Court said (p. 716):

> "The Statute does not expressly declare that the debtor's petition must be verified but we shall assume, as does official Form No. 65 (11 U. S. C. A. following section 53), that verification is required. But this is merely a procedural matter and the absence of a proper verification is not a jurisdictional defect, as has been frequently held with respect to petitions filed under other provisions of the Bankruptcy Act" (citing cases).

In the instant case the petition was verified. The alleged irregularity of the verification is not a jurisdictional defect. Even had there been no verification whatever, still, under the authorities, the defect would not have been jurisdictional.

Diligent research on our part has brought to light only one reported case where a petition in bankruptcy was attacked because a substantial interval of time elapsed between the verification of the petition and the filing thereof. In *In re Berner,* 3 A. B. R. 325 (U. S. D. C. N. D. Ohio, Eastern Div. in Bkcy.; Harold Remington, Referee) a voluntary petition filed two months after verification was held

jurisdictionally proper by Referee Remington who said, pages 328-329:

> "Concerning the fact that the petition and schedules were not sworn to at the time of filing, it seems to the referee that these are not jurisdictional defects but that the same could and should be cured by amendment. * * * The only case the referee has been directed to or has discovered which considered the effect of an interval elapsing between the verification and the filing of petition in bankruptcy is *In re: Abrahams,* Federal Cases No. 20 and this case inferentially is opposed to the contention of there being lack of jurisdiction upon that ground."

The petitioners, in attempting to obtain a dismissal of the petition herein, have sought to draw an analogy between their application to dismiss an involuntary petition and the right of creditors under the old act to attack a voluntary petition in certain cases (petitioners' brief, pp. 12-13). This argument must fail because, even in the cases cited by petitioner, the creditor would have been barred from attacking a petition had the defect been "less than jurisdictional" (petitioners' brief, pp. 12-13). The rule in those cases was that although a creditor might oppose an adjudication where jurisdictional elements were lacking, he could not do so where jurisdictional elements existed. *Re Fox West Coast Theaters,* 25 F. Supp. 250, affd. 88 F. (2) 212, cert. denied, *Tally* v. *Fox,* 301 U. S. 710, rehearing denied 302 U. S. 772. *There was no jurisdictional defect here.* Only the debtor himself could have attacked the form of the petition. As this Court said in *Royal Indemnity Co.* v. *American Bond and Mortgage Co.,* 289 U. S. 165 cited by petitioner:

> "Creditors have no standing to plead statutory requirements not intended for their protection."

The debtor's default was an admission of the allegations of the petition, and adjudication of bankruptcy properly followed (*Bradley* v. *Huntington,* 277 Fed. 948, 950).

## POINT II

**The petition presents no question warranting an appeal to this Court.**

Reduced to fundamentals, the petition herein presents but one question, namely the sufficiency of a petition in bankruptcy which has been filed more than four months after its verification by the petitioning creditors. That the District Court had jurisdiction of said petition has already been shown.

The petitioners therefore, in reality, seek a re-determination of the sufficiency of the petition in bankruptcy. Such a question is not one which this Court will review. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Amer. Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 383; *In Re Woods*, 143 U. S. 202, 206; *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587.

As this Court declared in *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 515:

> "And further, that while this power (to review) is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation of all Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Chief Justice Taft stated the proposition most emphatically in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, as follows:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court

> of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Clearly the formal sufficiency of a petition in bankruptcy is not a matter of such grave public importance as to require the time and attention of this Court.

## POINT III

**In any event, under the Chandler Act petitioners have no standing to contest the allegations of the bankruptcy petition.**

The old Bankruptcy Act, Section 18b, provided:

> "A bankrupt *or any creditor* may appear and plead to the petition within five days after the return date or within such further time as the court may allow."

The Chandler Act, Section 18b, retains the language of the old Section 18b, but omits the words *"or any creditor"*.

Section 59f of the old Bankruptcy Act provided:

> "Creditors, other than original petitioners, may at any time enter their appearance and join in the petition *or file an answer and be heard in opposition* to the prayer of the petition."

Section 59f of the Chandler Act again retains the language of the old section 59f, but omits the words "or file an answer and be heard in opposition to the prayer of the petition."

The deletions by Congress from the Chandler Act of these provisions of the old Bankruptcy Act which permitted creditors to be heard in opposition to a petition for involuntary bankruptcy were patently made for one purpose, namely, to take away from them that power which the old Bankruptcy Act had conferred upon them (and

which they had notoriously abused), and to reserve such power solely to the bankrupt. Any other interpretation would render these purposeful omissions meaningless. The opinion of the Circuit Court of Appeals (*In re Carden*, 118 Fed. 2nd 677) gave full expression to this view, holding at page 679:

> "The old Act provided in Sec. 18 (b) that the bankrupt or any creditor might appear and plead to the petition within five days after the return date or within such further time as the court might allow. In Sec. 18 sub. b of the Chandler Act this provision was changed by omitting the words 'or any creditor'. Similarly, Sec. 59 sub. f of the old Act, 11 U. S. C. A. § 95, sub. f, gave creditors, other than the original petitioners, the right to enter their appearance at any time and join in the petition or file an answer and be heard in opposition to the prayer of the petition. In Sec. 59 sub. f of the Chandler Act the words 'or file an answer and be heard in opposition' were left out. *These omissions make it clear that Congress did not intend to give a statutory right to creditors to contest the allegations in an involuntary petition.* We must take it for granted that the district court held that the application of the Chandler Act was feasible since it was actually applied and there is no question as to the soundness of that ruling."

The argument of the petitioner that the failure of Congress to specifically confer rights upon creditors to contest an adjudication under the Chandler Act was due to its reliance upon the reserve power of the bankruptcy court to accord such a status to them (p. 14, Petitioner's brief) is unsound. It is fully answered by the report of the House Committee on the Judiciary which discloses the legislative purpose behind these new sections:

> "The report of the House Committee on the Judiciary (Report No. 1408, 75th Congress, 1st Session), in referring to 'Amendments to increase efficiency in administration' states in part as follows:

> "'*The right of creditors to file answer eliminated.* The right of creditors to file an answer and oppose the petition has been eliminated in the amendment to Section 18 b, and Section 59 f has been changed to correspond to this amendment. A creditor should not be permitted to oppose an adjudication; invariably the motive of such creditor is to protect a preference or to retain some other undue advantage at the expense of the other creditors contrary to the fundamental purpose of the act—an equitable distribution among all creditors.'"
>
> *1 Prentiss-Hall Bankruptcy Service,* 1204.

The Judiciary Committee's report aptly describes the avowed motive of the petitioners herein in opposing the adjudication, *i. e.,* to "protect a preference or to retain some other undue advantage at the expense of the other creditors, contrary to the fundamental purpose of the act—an equitable distribution among all creditors". And it was specifically to remedy that abuse of the right of opposition by creditors under the old Act that Congress in the Chandler Act withheld that right from them.

To allow petitioners to oppose the adjudication here, and to achieve their admitted purpose, would nullify the present statute and its expressed legislative intent.

## POINT IV

**Petitioners' right to attack the bankruptcy proceedings is governed solely by the Chandler Act. It is clearly practicable and equitable to apply the Chandler Act to this situation.**

Petitioners' claim that they possess a general equitable right under the reserve power of the Court to attack the adjudication, was fully discussed and clearly answered by the Circuit Court of Appeals in its opinion (*In Re Carden,* 118 Fed. 2nd 677). The Court declared at page 679:

> "Since there is no longer any express statutory right given creditors to contest an adjudication upon an involuntary petition in bankruptcy, the right, if any, of creditors to make such a contest must rest upon general principles of equity applicable in bankruptcy proceedings. It is true that such principles will govern action in a bankruptcy court when not in conflict with the statute. Securities Comm. v. U. S. Realty Co., 310 U. S. 434, 457 60 S. Ct. 1044, 84 L. Ed. 1293. But where there has been an amendment to the statute whereby such right formerly existent has been withdrawn, there has been the equivalent of a statutory denial of the right and any action under general principles of equity contrary thereto would be contrary to the statute and so erroneous. Consequently, the appellant was without standing to question the sufficiency of the petition."

Notwithstanding petitioners' appeals for equity it is apparent that what they seek to accomplish is inequity. Petitioners concede that the sole purpose of their proceeding herein is to obtain a preference for their judgment of over $662,000 (purchased for $100) and perhaps thereby obtain all of the realizable assets of the bankrupt, at the expense, and perhaps the utter exclusion, of all the other creditors. It is axiomatic that the bankruptcy statutes look primarily to equitable distribution among all creditors. "In the disposition of property among creditors, equality is equity." *Bank* v. *Sherman,* 101 U. S. 403, 406.

There is no difficulty encountered here in applying the new provisions of the Chandler Act depriving creditors of the right to oppose an involuntary petition. Petitioners actually had no claim at all against the bankrupt until February 21, 1939, some six months after the effective date of the Chandler Act, when it purchased a judgment for $662,354.68 for the sum of $100. The "vestedness" of its right is more imaginary than real.

The application of the Chandler Act to the instant case is quite simple, fair and feasible. It affects only a prior existing procedural right. It was applied here merely by

denying the creditor's motion to dismiss. It did not impair, impede or complicate the efficient administration of the estate. Equity and justice require that the Chandler Act be applied herein, to the end that there may be a rateable distribution among all creditors.

## Conclusion

No question has been presented by the petition for review by this Court. Petitioners' entire argument rests upon an alleged insufficiency in a petition in bankruptcy which they assume, without citing any applicable legal authority in support thereof, deprived the court completely of its jurisdiction to adjudicate the defendant a bankrupt.

Petitioners' attack upon this adjudication is precisely the evil which the Chandler Act was designed to and did prohibit, namely the attempt by a single creditor to obtain an undue advantage at the expense of the other creditors. The intention of Congress to eliminate such practice is manifest in the Chandler Act, and in its legislative history.

**We submit, therefore, that the petition should be denied.**

Respectfully submitted,

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of Counsel.

Office - Supreme Court, U.S.
FILED
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# Supreme Court of the United States

OCTOBER TERM, 1941

No. 266

In the Matter
of
GEORGE A. CARDEN,
*Bankrupt.*

McCLAVE & COMPANY,
*Petitioners,*

GEORGE A. CARDEN, DANIEL LOEB and
Petitioning Creditors,
*Appellees.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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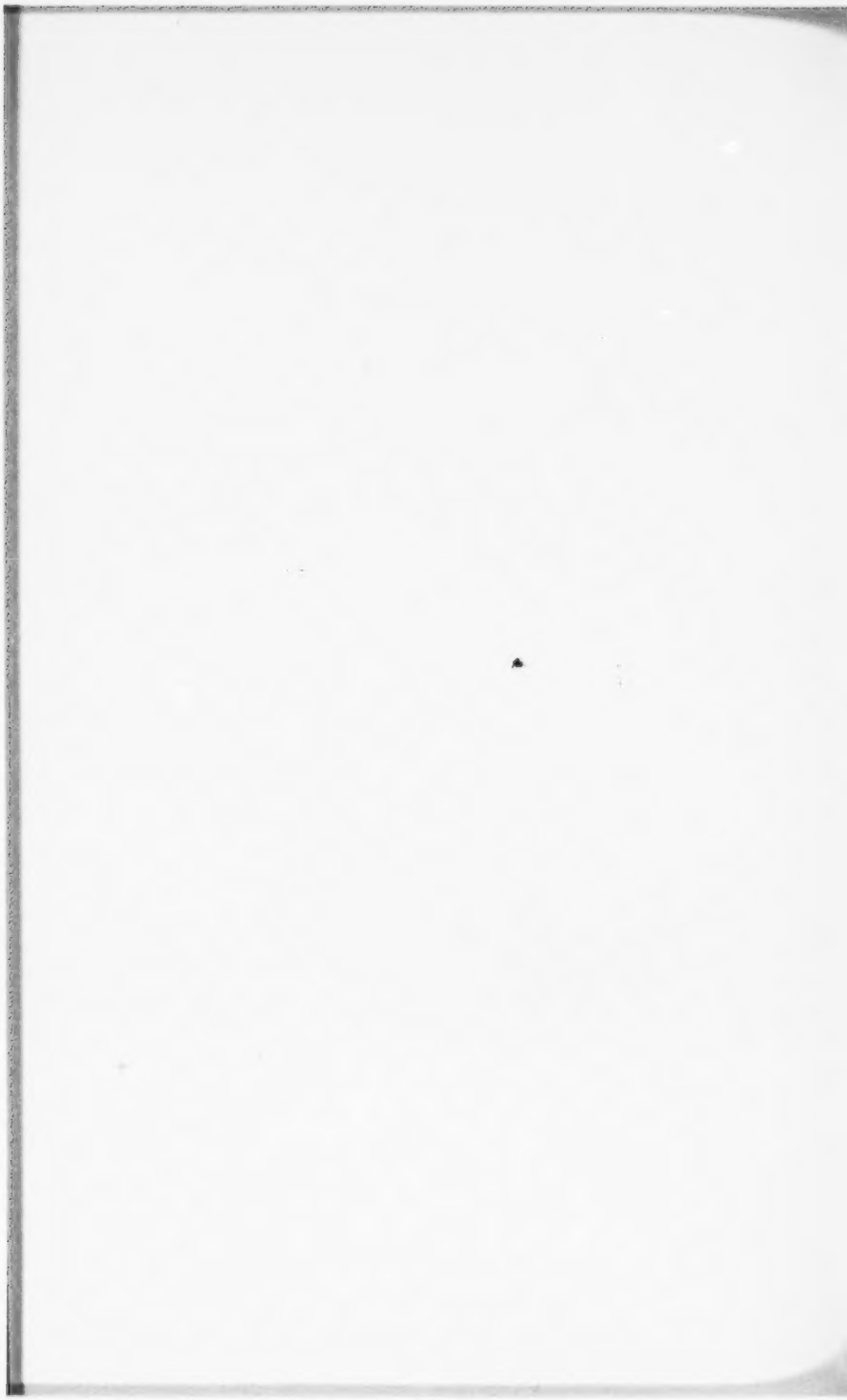

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

### Statement.

Respondents' brief invites a clarification of four aspects:

I. The character of the defect in the purported bankruptcy petition.

II. The validity of petitioners' judgment and of their title thereto.

III. The question of legislative power as distinct from that of legislative intent.

IV. The ethics of petitioners' position.

We shall consider these four aspects *seriatim*.

## I.

### The character of the defect in the purported bankruptcy petition.

Respondents' brief treats the defect in the purported petition as, variously, a defect of form or of pleading or as an irregularity with respect to the verification. Any such defect, it is then argued, was curable by the bankrupt's default and could not be treated as jurisdictional.

The answer to this contention is implicit in the statement in respondents' brief (p. 5, last three lines) to the effect that jurisdiction is satisfied in the presence of a petition in bankruptcy "containing the essential allegations". The purported petition in this case did not contain the essential allegations. The recital in the printed form of the occurrence of an act of bankruptcy "within four months preceding the filing of this petition" was conclusively falsified by that portion of the same paper which established that it had been verified more than a year before the filing. The verification date established, as a simple physical fact which the courts must recognize, that the act of bankruptcy to which it referred could not have taken place within four months preceding the filing. So that, even by the test referred to in respondents' own brief, this purported petition was jurisdictionally defective by reason of its omission of an essential allegation. In the absence of that essential allegation, the piece of paper was not a petition in bankruptcy at all, however solemn its aspiration to be one. A piece of paper which fails to refer to the occurrence of an act of bankruptcy within four months next preceding the date of its filing, or which reveals within its four corners that it could not have been referring to an act of bankruptcy so occurring, cannot be an involuntary bankruptcy petition at all. The absence of part of the essential nucleus sterilizes it. It could no more be a petition in involuntary bankruptcy than could be (say) a rebus puzzle.

## II.

### The validity of petitioners' judgment and of their title thereto.

We shall consider the validity of petitioners' judgment and the validity of their title thereto as two separate aspects.

Respondents' brief claims that petitioners' judgment was "on a promissory note given for a moral, but not legal consideration" (Respondents' Brief, p. 2, l. 16-17). The sole basis advanced for that characterization is the fact that when suit was brought upon the note more than six years after it had been executed, the maker defaulted (p. 18). No attempt of any kind has ever been made to question the consideration given for the note itself. Respondents have contented themselves with seeking to generate an atmosphere of suspicion from the circumstance of the maker's default in a situation wherein a plea of the statute of limitations might appear to have been legally available. Clearly, however, there can be neither impropriety nor basis for suspicion in the bankrupt's failure to have pleaded a technical defense in the absence of any evidence impugning either the propriety of the note itself or of the consideration given therefor.

Respondents' attack upon petitioners' title to their judgment rests in the claim that they had purchased it for $100.00 (Respondents' Brief, pp. 2, 3). The record reveals that the judgment had been purchased by petitioners at a publicly advertised receiver's sale held pursuant to a judgment which they had obtained against its previous owner; that petitioners, as plaintiffs in that suit, had had a prior lien of $60,000 against the proceeds from the sale of the judgment; and that, in the absence of any other bidders at the sale, petitioners had purchased it themselves, paying $100.00 rather than $60,000 for tax reasons (pp. 22-3).

The record shows that the validity of petitioners' purchase of this judgment was contemporaneously challenged, but was confirmed by order of the Supreme Court, New York County (pp. 23-4). The order confirming the sale of the judgment to these petitioners was thereafter affirmed by the Appellate Division, First Department, since the entry of the order by the District Court.

Petitioners might have rested simply upon the *prima facie* validity of their judgment and of their title therein—particularly in view of the fact that both have received confirmation from the courts of New York State. They have chosen, however, to set forth the facts as to both in order that the baseless character of respondents' attack might the more clearly be revealed.

## III.

### The question of legislative power as distinct from that of legislative intent.

We have already shown that the provisions of the Chandler Act must be understood in the light of the knowledge of Congress that it had always been the practice of bankruptcy courts to vacate petitions, on motion by others than those specifically authorized, either for jurisdictional defect or in the presence of some good reason why "the proceedings ought not to be allowed to proceed." *Securities & Exch. Com'n. v. U. S. R. & Imp. Co.*, 310 U. S. 434, 457-8. So viewed, it is most reasonable to assume that Congress had intended the provisions of the new Act to be subject to the same reservoir of judicial power.

Yet let us now, for the sake of this argument, assume the contrary. Let us even assume that it had been the intention of the Congress retroactively to destroy the creditor's power to vacate a petition of this kind even in a situation in which the petition had been filed under the old

Bankruptcy Act. Clearly, even such an assumption could not exhaust the problems which would then confront us. For, beyond the question of legislative intent, would arise the question of legislative power. The courts would still have to decide whether, assuming the intention of the Congress to have been as claimed, it would be practicable and constitutional to permit the provisions of the new Act, operating retroactively, to destroy the effective remedy upon the exercise of which a priority vesting under the old Act had depended.

We have limited ourselves at this point to indicating the extent to which we have a question of Congressional power along with the more obvious one of Congressional intent. The reasons why that question of power should be resolved in the manner for which petitioners have herein been contending will appear more fully from the subdivision of this brief which immediately follows.

## IV.

### The ethics of petitioners' position.

Respondents' brief argues that there is a kind of public policy in bankruptcy courts in favor of equality of distribution among creditors. But while the doctrine referred to has often been stated in some such manner, it is wanting in precision in the very respect in which precision is here essential. The true doctrine is that bankruptcy courts favor equality among creditors *of the same class*. Unless the italicized language be incorporated within the statement of the rule, the solicitude of both Bankruptcy Acts for the protection of legal priorities would be altogether unintelligible. In other words, it has always been the policy of the Bankruptcy Acts, both old and new, that legal preferences are held in as great respect as illegal preferences are held in disrespect. Applying this doctrine to the in-

stant case, it must be clear that, insofar as these petitioners have acquired a vested priority by the extension of the state court receivership to their judgment, their prior lien must be indestructible to any attack save one instituted in a legal manner.

In a sense this is the focal point of this controversy. If the general policy of equal distribution among creditors is to be carried to the point at which it involves the "rough-shod" obliteration of vested priorities, then, of course, any means employed will partake of the sanctity of the objective. In that case, these petitioners could not be heard to complain about the expropriation of their lien under the state court receivership. But if, on the other hand, the Chandler Act is not to be interpreted or applied as destructive of all legal liens and priorities, proceedings taken to the end of destroying such liens must be carefully analysed. Clearly, such proceedings may not ignore fundamental jurisdictional requirements. Clearly, also, they may not be permitted to invoke the provisions of a later statute in order retroactively to sterilize the remedy which had existed under the statute pursuant to which the petition itself had been filed and without which the substantive right itself must fall.

In other words, unless the validity of legal priorities is to be denied altogether, a bankruptcy petition must be, both, jurisdictionally sufficient and subject to the methods of challenge which are in force on the date of its filing.

Respectfully submitted,

SAMUEL C. DUBEESTEIN,
*Attorneys for Petitioners.*